

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

77-1083

To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

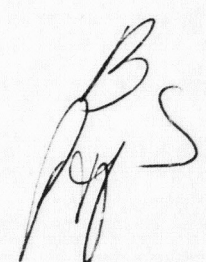
UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

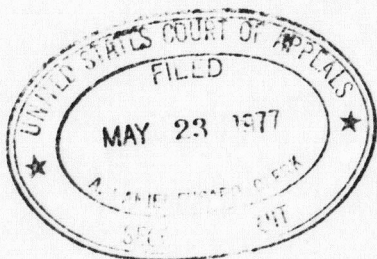
FRANK JOSEPH FUENTES and
CARMELLO SANSONE,

Defendants-Appellants.


Docket No. 77-1083

APPENDIX TO THE BRIEF FOR
APPELLANT FRANK JOSEPH FUENTES

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FRANK JOSEPH FUENTES
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,
Of Counsel.

PAGINATION AS IN ORIGINAL COPY

01 - FUENTES, FRANK JOSEPH

08' 26

76

0835 01

0208 01

0349

(LAST, FIRST, MIDDLE)

FILE SECTION

21:846

21:812,841

OFFENSES CHARGED

Consp. to viol. Fed. Narco. Laws.

Distr. & Possess. of Cocaine II.

1

2

U.S. MAG.

CASE NO.

76-955

BAIL - RELEASE

☐ AMT ☐ Engage
☐ Status ☐ Set ☐ Pers. Recog.
☐ S ☐ ON ☐ PSA☐ Bail Not Made ☐ Collateral
☐ Status Changed (See Docket) ☐ 3rd ☐ Pny Cust ☐ Other☐ Disposition of Charges ☐ On All Charges
☒ Convicted ☒ On Lesser Offense
☐ Acquitted ☐ WOP ☐ WOP
☐ Dismissed ☐ On Government's MotionSENTENCE
1-17-77

KEY DATES & INTERVALS

SUPERSEDING
COUNTS

ARREST or	INDICTMENT	ARRAIGNMENT	TRIAL
8/13/76 11:30 P.M. Summers Served	High Risk Date 8-26-76	9-2-76 1st Plea 9-2-76 Final Plea 11-22-76	Trial Set For 9-2-76 Trial Begun Trial Ended

MAGISTRATE

DATE	INITIAL/NO.	INITIAL APPEARANCE DATE	INITIAL NO.	OUTCOME
8/19/76	MDJ-08AB	8/19/76 PRELIMINARY EXAMINATION Date Scheduled 8/27/76 Date held REMOVAL HEARING WAIVED ☒ NOT WAIVED INTERVIEWING AND ORIENT	MDJ-08AB	DISMISSED HELD FOR GU OR OTHER PRO- CEEDING IN THIS DISTRICT HELD FOR GU OR OTHER PRO- CEEDING IN DISTRICT BELOW

21 USC 812,841(a)(1),841(b)(1)(A) and 846 - NARCOTICS

U.S. Attorney or Asst.

ATTORNEYS

Defense ☐ GJA ☐ Rep ☐ Narco ☐ Set ☐ None / Other ☐ PO ☐ CO

Alan Levine

791-0932

02-SANSONE

DATE	DOCUMENT NO.	PROCEEDINGS	EXCHANGABLE DELAY
8/19/76		Complaint filed, represented by Milton Rosenberg, Esq. Defendant remanded into the custody of U.S. Marshal in lieu of \$350,000 cash or surety.	
8-25-76		Indictment filed, 76 CR 835, SDNY.	
8-26-76		Deft.'s attorney filed notice of appearance: Milton Rosenberg, 401 Broadway, NYC. (925 9770)	
9-2-76		Deft. (Atty. present) pleads not guilty. Deft. cont'd remanded in lieu of \$350,000 bail as fixed by the Magistrate. Case assigned to Lasker, J...Werker, J.	
9-7-76		Filed the following papers rec'd from Mag. Jacobs. (Mag. #76-955) Designation Sheet, Criminal Complaint, Disposition Sheet, Notice of Appearance by Milton M. Rosenberg, 401 Bway, NYC 10013, 925-9770.	
11-9-76		Filed Gov't Bill of Particulars.	
11-9-76		Filed Second Offender Information.	
11-17-76		Filed transcript of record of proceedings, dated 9-17-76	

IV. PROCEEDINGS (continued)

PAGE TWO

V. EXCLUDABLE DELAY

DATE	DESCRIPTION	EXCLUDABLE DELAY
11-9-76	Dfts. Fuentes pres. w/acty. Milton M. Rosenberg & U.S. Atty. Michael Carey pres. Trial begun. Jury selected.....Lasker J.	
11-10-76	Trial Cont'd.	
11-11-76	" "	
11-15-76	" "	
11-17-76	" "	
11-18-76	" - Count 2 Dismissed against deft. Fuentes.	
11-22-76	" & Concluded. Dft. Frank Fuentes - Found Guilty on count 1 & Dft. remanded to custody. Sentences set for 1-10-77 at 10 AM.....Lasker J.	
12-2-76	Filed Dfts. Requests to Charge.	
12-2-76	Filed Govts. Supplemental Requests to charge.	
12-6-76	Filed Order that Dr. Stanley Portnow, 823 Park Ave., NYC 10021 a psychiatrist, be employed to examine dft. as indicated. And that the Dr. be permitted to visit & interview dft. at MCC, Park Row, NY at a time as indicated. for conducting such examination, & prepare a written report of findings & conclusions, & submit report to Judge Lasker on or before 12-17-76, copy to U.S. Atty., SDNY Atty. Michael Q. Carey, AUSA & copy to Stuart R. Shaw, 600 Madison Ave, NYC 10022, & U.S. Atty. directed to pay a reasonable fee for the services of Dr. Stanley Portnow not to exceed the sum of \$60.00 Dollars per hour.....Lasker J. (mn)	
1-17-77	Filed Judgment & Commitment (Atty. Milton M Rosenberg) The Dft. is hereby committed to the custody of the atty. gen. or his authorized representative for imprisonment for a period of SEVEN (7) YEARS on Count 1. The dft. shall serve a Special Parole Period of SIX (6) YEARS as a multiple felony offender. Right to Appeal.....Lasker J. Issued Commitment 1-23-77.	
1-21-77	Filed Dfts. Notice of Appeal. (mailed notice)	

B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

76 CRIM. 0835

----- x
UNITED STATES OF AMERICA :

- v - :

INDICTMENT

FRANK JOSEPH FUENTES, :
and CARMELLO SANSONE, :
a/k/a "Michel", :

76 Cr.

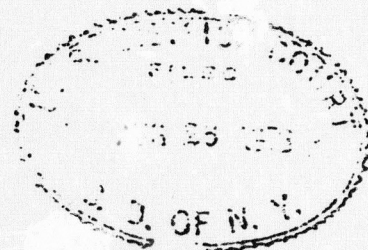
Defendants. :
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COUNT ONE

The Grand Jury charges:

1. From on or about the 1st day of May, 1976 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, FRANK JOSEPH FUENTES and CARMELLO SANSONE, a/k/a "Michel," the defendants and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.



OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. On or about the 28th day of May, 1976, in the Southern District of New York, FRANK JOSEPH FUENTES, the defendant, gave to another individual approximately .36 grams of cocaine in the vicinity of 9th Avenue and 44th Street, New York, New York, as a sample of the future sale of 5 kilograms of cocaine.

3
MICROFILM

AUG 27 1976

2. On or about the 4th day of June, 1976, in the Southern District of New York, CARMELLO SANSONE, a/k/a "Michel," the defendant, met with an agent of the Drug Enforcement Administration in the vicinity of the Market Diner, 43rd Street and 11th Avenue, New York, New York, and had a conversation concerning the sale of approximately 1/2 kilogram of cocaine.

3. On or about the 4th day of June, 1976, in the Southern District of New York, CARMELLO SANSONE, a/k/a "Michel", and FRANK JOSEPH FUENTES, the defendants, met with another individual in the vicinity of 106th Street between Lexington Avenue and 3rd Avenue, New York, New York, and sold that individual approximately 1/2 kilogram of cocaine for \$20,000.

4. On or about the 4th day of June, 1976 in the Southern District of New York, CARMELLO SANSONE, a/k/a "Michel," the defendant, gave another individual approximately \$1,300 as his commission for the sale of approximately 1/2 kilogram of cocaine in the vicinity of 106th Street between Lexington Avenue and 3rd Avenue, New York, New York.

5. On or about the 15th day of June, 1976, in the Southern District of New York, CARMELLO SANSONE, a/k/a "Michel," the defendant, had a conversation with an agent of the Drug Enforcement Administration in the vicinity of 43rd Street and 11th Avenue, New York, New York concerning the future sale of French heroin.

6. On or about the 18th day of June, 1976, in the Southern District of New York, CARMELLO SANSONE, a/k/a "Michel," the defendant, gave an agent of the Drug Enforcement Administration approximately 1.45 grams of cocaine in the vicinity of 108th Street and Riverside Drive, New York, New York, as a sample of the future sale of 1 pound of cocaine.

(Title 21, United States Code, Section 846.)

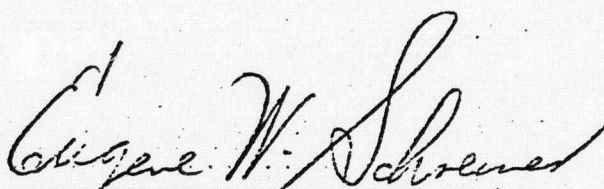
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n-2550

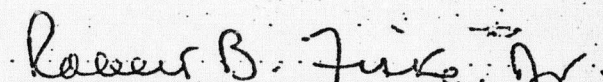
COUNT TWO

The Grand Jury further charges:

On or about the 4th day of June, 1976 in the Southern District of New York, FRANK JOSEPH FUENTES and CARMELLO SANSONE, a/k/a "Michel," the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule II controlled substance, to wit, approximately 515.97 grams of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B)) and Title 18, United States Code, Section 2.)


FOREMAN


ROBERT B. FISKE, JR.
United States Attorney

76 CRIM. 0835

Form No. UHA-336-274 (Ed. 9-25-58)

United States District Court

SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

FRANK JOSEPH FUENTES
and CARMELLO SANSONE, a/k/a
"Michel",

Defendants.

INDICTMENT

76 Cr.

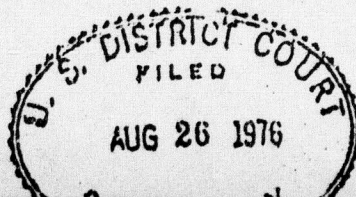
(In violation of 21 U.S.C. 812, 841
(a)(1), 841(b)(1)(A), 841(b)(1)(B) and
846. 18 U.S.C. § 2.

ROBERT B. FISKE, JR.

United States Attorney.

A TRUE BILL

Clyde W. Delaney
Foreman.



JUDGE LASKER

8-26-76 Indictment Ordered Filed
Hudson, N.Y.

9-2-76 - Dept. Frank Joseph Fuentes

(Atty. present) pleads NOT GUILTY. Dept.
Continued remanded in lieu of \$350,000.
bail as fixed by Magistrate.

Dept. Carmello Sansone

(Atty. present) pleads NOT GUILTY. Dept.
Continued remanded in lieu of \$750,000.
bail as fixed by Magistrate.

Assigned Lasker for all
purposes. *Workef.*

Nov. 9, 1976 - Depts. Fuentes pres. by
Atty. Milton M. Rosentau &
Dept. Carmello Sansone pres.
Stuart Shaw, U.S. Atty.
Michael Carey Pres. Trial
begun. Jury selected. *do.*

Nov 11, 1976 - " "

Nov 15, 1976 " "

Nov 17, 1976 " "

Nov 18, 1976 " "

CT 2 dismissed
against Def't Fuentes

Nov. 22, 1976 Trial ended + conclude

Def't Frank Fuentes, found Guilty
on Count 1 and Def't Carmello Sena

Guilty on Counts 1 and 2 -

Def'ts remanded to custody.

Sentences set for Jan. 10, 1977
at 10 am

Tucker J

8

Jan. 17, 1977 - Def't - Frank Fuentes pres.
vs. Stg. Michael Rosenburg

SEVEN (7) YEARS on Count 1. The defendant shall serve a Special Parole
Period of SIX (6) YEARS as a multiple felony offender

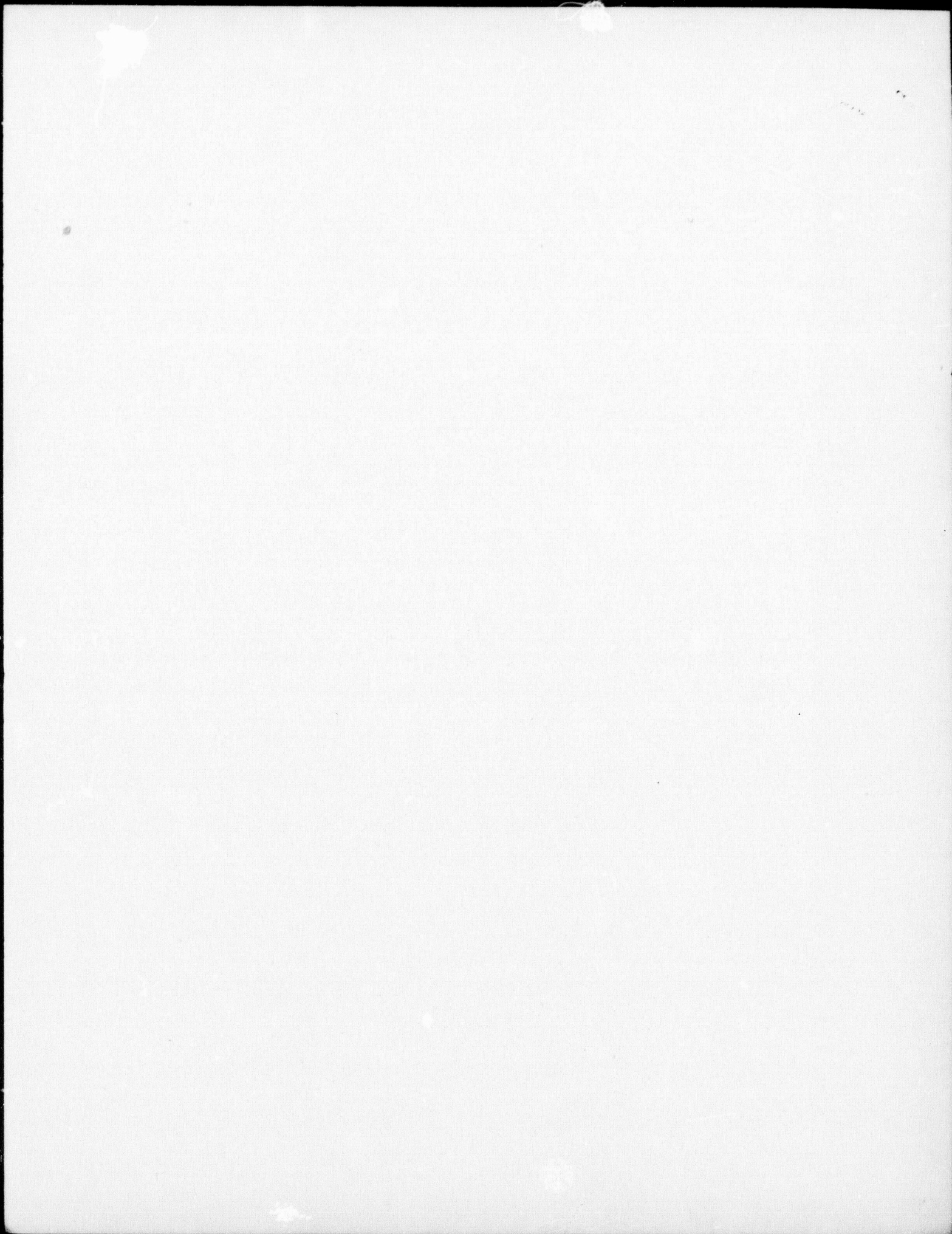
Right to Appeal

Tucker J

Jan 17, 1977 - Frank Serrano pres.
vs. Stg. Stuart Shaw

TEN (10) YEARS on Counts 1 and 2, the said sentences to run
concurrently and not consecutively. The defendant shall serve
a Special Parole Period of SIX (6) YEARS as a multiple felony
offender.

Tucker J



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NOV 9 1976

UNITED STATES OF AMERICA

INFORMATION

- v -

FRANK JOSEPH FUENTES,

Defendant.

Section 851 of Title 21,
U.S.C. relating to
Indictment 76 Cr. 835
filed the 26 day of
August, 1976.

I, Robert B. Fiske, Jr., United States Attorney
for the Southern District of New York, do accuse the de-
fendant above-named who is also named in Indictment 76 Cr.
835 (MEL) of having been previously convicted as herein
below described.

The said defendant, on or about the 21 day of
May, 1958, in the Southern District of New York, was
duly convicted of unlawfully possessing and selling heroin
and conspiring to do so in violation of Title 21, United
States Code, Sections 173 and 174: (Indictment C155-13).

The said defendant on or after February 14,
1964, pursuant to Rule 20, F. R. Crim. P., entered a plea
of guilty in the District of Puerto Rico, to charges in
the Southern District of New York for possessing heroin
and conspiring to do so, in violation of Title 21,
United States Code, Sections 173 and 174.

Robert B. Fiske

ROBERT B. FISKE, JR.
United States Attorney

A TRUE COPY
RAYMOND F. BURCHARDT, Clerk
[Signature]
Deputy Clerk

(Jury present at 9.55 a.m.)

THE COURT: Good morning.

I'm read to proceed now with my instructions to you as to the law in this case.

Ladies and gentlemen, like everything else in life the law, I'm afraid, has gotten more complicated than it was in the simple days when a kindly old judge could sit up on the bench and just tell the jurors what it was all about. For that reason and because the charges in cases

1 csll

2 of this kind are serious ones, the practice of this Court
3 and most judges today is to put their charges into
4 writing.

5 I mention that for two reasons:

6 First of all, to apologize because I would much
7 rather talk to you directly as I'm doing at the moment and,
8 secondly, to caution you that if I should be reading too
9 fast for you to understand the very substantial importance
10 of what I'm saying, I ask you to raise your hand I will
11 reduce my rate of reading. I hope that won't be a
12 problem.

13 Ladies and gentlemen, I do ask for your
14 complete attention to what I'm about to tell you.

15 Now that you have heard the testimony and the
16 arguments of counsel, the time has come to instruct you
17 as to the law governing the case.

18 You have been chosen and sworn as jurors in
19 this matter to try the issues presented by the allegations
20 of the indictment, and on your determination of the facts,
21 and I stress the words "your determination" to decide
22 under the law, as I shall instruct you, whether the Govern-
23 ment has proven any of the charges of the indictment against
24 any of the defendants beyond a reasonable doubt.

25 I will discuss those charges with you in detail

1 csl2

2 in a moment, but before that I want to give you a few
3 more preliminary and general instructions.

4 First, you are to perform your duty as jurors
5 without bias or prejudice to or for anybody, whether the
6 Government or either of the defendants. The law does
7 not permit jurors, and you wouldn't want it to permit
8 jurors to be governed either by sympathy or swayed by
9 prejudice or public opinion.

10 In that connection I want to point out that
11 although this case involves narcotics, the subject matter
12 of this case has nothing to do with your deliberations
13 except that as one of the facts you must find as to the
14 substantive counts that indeed what was possessed was
15 narcotics, but you do not find a man guilty or not guilty
16 because of the nature of the charge. You only find
17 him guilty if the Government proves the element of the
18 offense which I will specify for you hereafter beyond a
19 reasonable doubt.

20 Second, we start with the proposition that we
21 started with at the outset of the trial, that is, that the
22 law presumes every defendant to be innocent against every
23 charge that is made.

24 You will recall that when you were selected
25 I specifically asked each one of you if you could enter

1 cs13

2 into the discharge of your duties presuming each defendant
3 to be innocent unless and until proven guilty beyond a
4 reasonable doubt after your own deliberations and each of
5 you gave me the answer "Yes".

6 This presumption of innocence alone is
7 sufficient to acquit any defendant unless and until you
8 as jurors have unanimously satisfied yourselves beyond a
9 reasonable doubt of that particular defendant's guilt
10 on that particular charge.

11 Now, the burden or responsibility is on the
12 Government to prove a defendant guilty beyond a reasonable
13 doubt of every essential element of each crime charged,
14 and I will advise you later just what these elements are.

15 Third, I want to remind you of what I
16 mentioned at the outset of the trial, that is, that the
17 existence of the indictment does not constitute evidence
18 against either defendant but is merely a method of bringing
19 a charge. The indictment in this case contains two
20 counts, as you know. Each count contains a separate
21 crime and each of the charges must be considered
22 separately.

23 Equally important is the observation that the
24 indictment names two defendants.

25 In the determination of innocence of guilt, you

1 csl4

2 must bear in mind that determination is personal.
3 guilt or innocence of the defendant on trial before you
4 must be separately determined with respect to him solely
5 on the evidence presented against him or the lack of
6 evidence.

7 The case of each defendant stands or falls upon
8 the proof or lack of proof of the charge against that
9 defendant and not against someone else.

10 Now, I have said and the lawyers have said
11 many times throughout the case that the Government has
12 assumed the responsibility of proving each defendant guilty
13 beyond a reasonable doubt. Let me define that important
14 term for you at the outset.

15 A reasonable doubt is not a vague, speculative
16 or imaginary doubt. It is a doubt which, as the phrase
17 suggests, is based upon reason and which comes either from
18 the evidence or from the lack of evidence. It is a doubt
19 which a reasonable man or woman might entertain. It is
20 a doubt, and I think this is the best definition, which
21 would cause reasonable men or women like yourselves to
22 hesitate to act in connection with matters that are of
23 importance in your own private lives.

24 Let us say you have an important decision to
25 make. How do you go about making that decision? You

1 cs15

2 think about everything you know about it and you think
3 about everything you want to know and haven't been told,
4 and you say to yourselves:

5 Do I have enough information, do I have enough
6 dependable information so I'm ready to act? If you say
7 "I don't have enough," then you have a reasonable doubt.
8 If you say "I do," then you may proceed. A mere suspicion
9 can't justify conviction. Suspicion is no substitute
10 for evidence, nor is it sufficient to convict if you find
11 that the circumstances merely render the guilt of a
12 defendant probable. The law does not deal in
13 probabilities.

14 On the other hand, in saying that the Government
15 must prove a case beyond a reasonable doubt, if there is to
16 be a conviction, I do not mean that the Government is
17 required to prove guilt beyond all possible doubt. Indeed
18 in human affairs it is hard to think of anything we can
19 prove beyond all possible doubt with the exception of
20 mathematical propositions, but the proof must be of such
21 convincingly character that you would be willing to rely
22 and act on it in the most important decisions of your own
23 affairs.

24 The evidence in this case, as I have told you
25 a number of times, consists of the testimony of witnesses,

1 cs16

2 the exhibits which have been received in evidence and
3 facts which have been stipulated or agreed to by counsel.
4 You have to decide the case based solely on the evidence,
5 but in your consideration of the evidence you are not
6 limited to the bald statement of the witnesses here or
7 of any witnesses in any trial. By using the word "bald"
8 I don't mean to suggest anything about the character of
9 the testimony, but I mean you are entitled to and you
10 are obliged to think about the mere words that were
11 uttered.

12 In deciding the many questions before you,
13 it is your job to determine credibility of the witnesses
14 who have testified.

15 How do you go about that? Perhaps the best
16 answer is to say that you determine the truthfulness or
17 accuracy or weight to be given to a witness' testimony in
18 the same way you determine questions in your own personal
19 affairs. We are all constantly called upon from day-
20 to-day to determine how much confidence we place in the
21 statements people make to us. The truthfulness or
22 dependability of a witness as that of any person can be
23 determined by his demeanor, his look, his relationship
24 to the case and to the parties, the possibility of his
25 being biased or of his not being biased or impartial;

cs17

the stake he may have in the outcome of the case, the reasonable or unreasonableness of his statements, the strength or weakness of his recollection, and the extent to which what he has said has either been corroborated or contradicted by testimony of other witnesses or by exhibits or stipulations.

In ordinary life when you made to determine the truthfulness of a person you ask yourselves, don't you, as you do here, did he impress you? Did his version seem straightforward and candid? Did he seem to be trying to hide some of the facts, or did he have any motive to testify falsely, or no motive?

Now, ladies and gentlemen, in the summation of counsel reference has been made to the presence or non-presence of the informant Hugo. I advise you in that connection that counsel for the defendants did not have available to them the address or whereabouts of the informant Hugo at any time before or during the trial and that the Government has not had such information since November 5, 1976, which I believe is shortly before this trial commenced, and at present Hugo is unavailable to both the defendants and the prosecutor. On this point I instruct you that you may draw such inferences that are reasonable in the circumstances from the facts that I have

1 csl8

2 just advised you.

3 Ladies and gentlemen, as I have told you, your
4 determination in this case must be based on the evidence.

5 Now, there are two types of evidence to which
6 we normally refer. I'm sure you have heard them spoken
7 of often. One is called direct evidence, that is, the
8 evidence of an eyewitness or an ear witness. "I have
9 heard it," such a witness would say, or "I have seen it
10 myself."

11 The other is more indirect and is generally
12 called circumstantial evidence. Circumstantial evidence
13 is defined as the proof of a chain of events or circum-
14 stances which itself points to the existence or non-
15 existence of facts as to which there was no eyewitness
16 or ear witness.

17 The law makes no distinction as to the
18 importance or weight to be given to circumstantial as
19 distinct from direct evidence. It requires only that
20 you, the jury, find the facts in accordance with the
21 evidence in the case, both direct and circumstantial,
22 beyond a reasonable doubt, of course.

23 An example, by the way, of the difference
24 between circumstantial and direct evidence which is often
25 given to jurors but which is vivid, I think, is as

cs19

follows:

If you looked out the window, if you could, in this courtroom and noticed that it was raining or snowing, that would be direct evidence of the fact. On the other hand, if all the blinds were drawn, as they are here, and somebody came through the door of the courtroom with a dripping umbrella, that would be pretty good circumstantial evidence that it was raining or snowing outside. You wouldn't have seen it with your own eyes, but you would have the right to infer seeing a man come through the door with a dripping umbrella that it was raining outside. To be sure, he might have been standing in the shower in one of the rooms of this building that have a shower, but that would be a little unlikely, and the other inference would be the more normal one.

Now, ladies and gentlemen, the United States Attorney and defense counsel have from time to time throughout the cours of the trial objected tot he introduction of evidence or addressed arguments to the bench. It is the duty of attorneys on both sides to make such objections when the attorney believes that the other side is proposing to put into evidence or ask questions about something that is not properly admissible.

I want you to understand that when I have

1 cs20
 2 sustained an objection to a question or when I have
 3 overruled an objection to a question, that doesn't
 4 indicate any attitude of mine towards the case. What
 5 it means, and the only thing it means, is that if I have
 6 sustained an objection or told you to disregard the
 7 information, you are to disregard the question or the
 8 answers, as the case may be, and where I have ruled against
 9 the question, not to try and figure out what a witness
 10 might have answered if he had been allowed to do so.

11 Now, ladies and gentlemen, that I have instructed
 12 you as to the manner in which you should consider the
 13 evidence and since you have heard long summaries of the
 14 respective contentions of the lawyers, I will turn to the
 15 substance of the charges against Mr. Sansone and Mr. Fuentes.

16 The indictment, as you know, contains two
 17 counts. Each count, as I mentioned before, is a separate
 18 offense and each must be considered separately by the
 19 jury.

20 Count 1 charges a conspiracy between the defend-
 21 ants or between the defendants and others not named, and
 22 is called a conspiracy count.

23 Count 2 charges Mr. Sansone alone with actually
 24 violating the laws relating to the control of narcotic
 25 substances and is called the substantive count.

cs21

I will deal first with the conspiracy charge, both because it comes first in the indictment and because the discussion may take a little bit longer.

Before you may convict either defendant under a conspiracy charge, you must find that the Government has proven beyond a reasonable doubt all three of the following elements. I repeat that the Government must prove all of the following factors:

First, the existence of the conspiracy charged. Obviously nobody can be guilty of belonging to a conspiracy unless there was a conspiracy as charged in the indictment.

Second, that the defendant whose guilt or innocence you are considering at the time knowingly and wilfully joined the conspiracy.

Third, that at least one of the conspirators committed at least one of the so-called overt acts mentioned in the indictment and which I will tell you more about shortly.

If the Government fails to establish any one of those essential elements beyond a reasonable doubt as to either defendant, then you must acquit that defendant on Count 1. On the other hand, if it succeeds in proving all of those things as to a particular defendant, then of course it is your duty to convict that defendant

1 cs22

2 on count.

3 Now, as I have said, the gist of the crime
4 of conspiracy is an unlawful agreement to violate the
5 law.

6 Ladies and gentlemen, I get worried sometimes
7 about the instructions which we judges give about con-
8 spiracy, because I think sometimes we instruct the jury
9 to fare-thee-well, and I hope I don't do that today.
10 There are a lot of things that is important for you to
11 know, but what you need to remember as you are mooring for
12 the discussion about conspiracy is that a conspiracy is
13 nothing more nor less than an agreement of two or more
14 people, of course an intentional and knowing agreement to
15 violate the law, and if you bear that in mind I think
16 all of the other aspects of the instructions will be much
17 clearer to you.

18 Whether or not the defendant or defendants
19 accomplished what it is alleged that they and others
20 conspired to do is immaterial to the question of guilt
21 or innocence in regard to a conspiracy. A conspiracy
22 need not be successful in order to constitute an illegal
23 act or crime. It is the very conspiracy or agreement
24 itself together with at least the commission of one overt
25 act that creates the crime.

1 cs23

2 Since a conspiracy is by definition an agree-
3 ment between or among people to violate the law, each
4 member, once you are satisfied that somebody became a
5 member of the conspiracy, becomes the agent of every other
6 member.

7 I want to comment on that point:

8 You may remember that early in the trial and
9 during the course of the trial I have several times
10 explained to you that it was not always possible to put
11 the evidence in any particular order that might be ideal,
12 and that some evidence might be put in as to a statement
13 with regard to defendant X or by defendant X which might
14 apply to defendant Y, but that it could only be applied
15 to defendant Y if you found on independent evidence against
16 defendant Y that he, indeed, was a member of the conspiracy.

5 17 I want to remind you of that instruction again
18 and I will shortly give you an instruction as to how you
19 are to determine whether a defendant should be adjudged
20 to have become a member of the conspiracy or not.

21 Now, coming to the nature of the conspiracy itself,
22 to establish the existence of a conspiracy the Government
23 is not required, of course, to show that two or more
24 people sat around a table and entered into a solemn agree-
25 ment orally or in writing saying that they were forming a

1 cs24

2 conspiracy. Common sense makes it clear that when
3 people decide to enter into a criminal conspiracy they
4 are not going to announce it publicly or openly.

5 It is sufficient if the Government establishes
6 to your satisfaction beyond a reasonable doubt that two
7 or more people named in this indictment as defendants or
8 as co-conspirators came to a common understanding to
9 violate the law. Particular language or specific words
10 are not required to indicate attachment to a conspiracy,
11 nor is it required that you find that all of the con-
12 spirators alleged in the indictment joined in the con-
13 spiracy in order to find that the conspiracy existed, but
14 obviously you must find at least two people did, or you
15 can't have a conspiracy.

16 Now, an aside on that, ladies and gentlemen.
17 There are only two defendants in this case and they are
18 the ones clearly who are principally charged with having
19 conspired together, and I believe the Government funda-
20 mentally puts that proposition before you. However, I do
21 point out that the indictment charges that the defendants
22 conspired not only with each other but among themselves
23 and others not named in the indictment.

24 The offense of conspiracy is complete when the
25 unlawful agreement is made and any single overt act to

cs25

effect the object of the conspiracy is thereafter committed by at least one of the conspirators.

Of course, proof that the conspiracy actually has been accomplished may be the most persuasive evidence that the conspiracy actually existed, and if you believe that the venture alleged here was successful, the success itself would be very good proof, of course, of existence of the conspiracy.

If upon consideration of the evidence you find beyond a reasonable doubt that the minds of two of the alleged conspirators met in an understanding, then proof of existence of the conspiracy is complete. That is the first element which the Government must establish.

Now let's talk about the second element which the Government must prove, that is, membership in the conspiracy, individual membership. You cannot find either of the gentlemen here on trial guilty of Count 1 unless you find that that particular defendant wilfully and knowingly joined the conspiracy. Let's be more specific. If you conclude that the conspiracy charged in the indictment existed, you must next determine whether the defendant whose case you are considering participated in the conspiracy with knowledge of its unlawful purpose and in

cs26

furtherance of its unlawful objectives.

Thus, mere knowledge by either defendant of the existence of the conspiracy or of any illegal act on the part of the alleged co-conspirators or mere association with a conspirator is not sufficient in itself to establish membership in the conspiracy.

The Government must establish beyond a reasonable doubt that the defendant in question was aware of the basic purpose of the conspiracy and that he entered it with specific intent of violating the law.

Now, whether or not a particular defendant was a member of the conspiracy or joined the conspiracy must be determined, as I said before, on the evidence as to his own actions and not those of someone else.

The guilt of a co-conspirator, if you find that there was a conspiracy and he did join it, is not governed by the extent or duration of his participation in the conspiracy or whether he had knowledge of all its operations. Even if one joined the conspiracy after it was formed and was engaged in it to a degree more limited than that of some other co-conspirator, he may still be found guilty of conspiracy.

Ladies and gentlemen, we now come to the last element which the Government must prove as to the con-

cs27

1
2 conspiracy charge. Assuming that you find that the con-
3 spiracy existed and that the defendant in question was a
4 member of the conspiracy, then it must nevertheless be
5 demonstrated that one of the co-conspirators committed at
6 least one of the overt acts charged in the indictment.

7 Among the overt acts charged in the indictment,
8 and you will have the indictment to look at yourselves if
9 you wish, for example, are that:

10 "On or about the 23th day of May 1976 in
11 the Southern District of New York Frank Joseph
12 Fuentes, the defendant, gave to another individual
13 approximately .36 grams of cocaine in the vicinity
14 of Ninth Avenue and 44th Street, New York, New
15 York, as a sample of the future sale of five kilo-
16 grams of cocaine."

17 The second alleged overt act is that:

18 "On or about the 4th day of June, 1976 in
19 the Southern District of New York Carmello Sansone,
20 also known as Michel, the defendant, met with an
21 agent of the Drug Enforcement Administration in the
22 vicinity of the Market Diner, 43rd Street and Eleventh
23 Avenue and had a conversation concerning the sale
24 of approximately one-half kilogram of cocaine."

25 Now, the purpose of requiring proof of at

cs28

1 least one overt act is not inconsequential. It is that
2 while parties may conspire and agree to violate the law
3 they could and they do change their minds and do nothing
4 to carry out that plan. That is a possibility. In
5 such a case no crime would be committed. You and I can
6 sit here and plan to blow up the Capitol of the United
7 States, for example, and talk about it for days on end,
8 but if we never do anything about that may not be a
9 crime. The moment, however, one of us does something in
10 furtherance of the crime or the agreement, then the crime
11 of conspiracy is complete.
12

13 It is true that overt acts elicited in an
14 indictment often are not criminal in themselves, although
15 they often are. That does not mean, however, that
16 an action taken may not have sufficient weight to be in
17 furtherance of a crime. If, for example, I phone
18 you in connection with our alleged plan to blow up the
19 Capitol of the United States and suggest that we meet at
20 a certain time and place, while I may be perfectly normal
21 and not criminal to telephone people, the act which I
22 have asked would be an act in furtherance of the con-
23 spiracy.

24 The Government is not required to prove that
25 each member of the conspiracy committed or participated in

cs22

any particular overt act, since the act of any one conspirator, done in furtherance of the conspiracy, becomes the act of all other members of the conspiracy.

Moreover, the Government is not required to prove that each of the listed overt acts actually occurred. It is sufficient if it proves the commission of one of the overt acts by one of the co-conspirators.

Ladies and gentlemen, while the indictment before you charges that the conspiracy ran from on or about May 1, 1976 to the 26th of August, 1976, it is not essential that the Government prove that the conspiracy started and ended precisely on the specified date. It is sufficient if you find that in fact a conspiracy was formed and existed for some time within the period within the indictment itself and that at least one of the overt acts was committed in furtherance of the conspiracy during that period.

Now, ladies and gentlemen, I finished instructing you as to the conspiracy count and I will proceed to discuss Count 2 of the substantive count. The statute or law passed by Congress, which Mr. Sansone is alleged to have violated in regard to Count 2, is Section 841 of Title 21 of the United States Code, which reads in pertinent part -- that is, the part we are concerned with -- as

1 cs30

2 follows:

3 "It shall be unlawful for any person knowingly
4 or intentionally to distribute or to possess with
5 intention to distribute a controlled substance."

6 Before you can find Mr. Sansone guilty of the
7 crime charged in Count 2 you must find that the Government
8 has proven beyond a reasonable doubt all of the following
9 three elements:

10 First, that on or about the date set forth
11 Mr. Sansone distributed or possessed with intention to
12 distribute a narcotic drug controlled substance;

13 Second, that he did so unlawfully, wilfully
14 and knowingly; and

15 Third, that the substance which he possessed
16 was in fact a narcotic drug controlled substance.

17 I want to say something a little further about
18 these three elements.

19 The first is to distribute a drug or possess it
20 with intention to distribute it.

21 What do those phrases mean? Well, the word
22 distribute means an actual or constructive or attempted
23 transfer.

24 The word "possess" has its common every-day
25 meaning, that is, to have something within your control.

cs31

not necessarily in your hand or pocket. Control may be demonstrated by the existence of a working relationship between the person having the control and the person who has actual physical custody.

The word "intent", of course refers to a person's state of mind.

So, putting it all together, the term "possess with intent to distribute", means to control an item with the purpose of transferring it.

If you find beyond a reasonable doubt that Mr. Sansone actually made a transfer of the narcotic drug controlled substance, that finding would, of course, satisfy this requirement of the crime. Moreover, if the proof shows that Mr. Sansone merely possessed or controlled a narcotic drug controlled substance but possessed it with the intent of distributing it, that finding would also satisfy the requirements of this element of the offense.

The second element of the offense charges, of course, and not surprisingly, that a defendant cannot be found guilty unless you find his distribution or possession with intention to distribute was unlawful and wilfull and knowing. Those words mean that you must be satisfied beyond a reasonable doubt that Mr. Sansone knew what he was doing; that he did it deliberately and volun-

cs32

tarily and not mistakenly or accidentally or as a result of coercion.

For example, if you sold somebody some packets of what you thought were granulated sugar and they turn out to be cocaine or heroin, you would not be guilty of a crime even though you would literally have distributed a narcotic drug controlled substance.

Of course, it is not necessary that Mr. Sansone knew that he was violating any particular law. It is sufficient if you are convinced beyond a reasonable doubt that he was aware of the nature of his acts and the general unlawful nature of them.

As to the third element, the substantive count charged that the narcotic drug controlled substance in this case was either heroin or cocaine. It does not charge anything about heroin, just cocaine. I instruct you as a matter of law that cocaine is a narcotic drug controlled substance. You, however, must still find beyond a reasonable doubt that the substances in question in the count charged was cocaine. With respect to this matter you should remember that counsel have stipulated that if the Government chemist were called to testify he would testify that the Government exhibits placed before you contain cocaine in varying amounts and varying

standards of purity.

Ladies and gentlemen, Mr. Sansone has interposed a defense of what is called entrapment. The word "entrapment" is a legal term. It has a technical meaning which is different from that of popular speech or ordinary usage. Therefore, I will explain the word and the meaning of entrapment as it is used in the law.

The defense of entrapment is based upon a policy that law enforcement agencies cannot be allowed to manufacture crime. They cannot lead innocent people into committing a crime simply in order to prosecute them. But a line must be drawn, of course, between the entrapment of the unwary innocent and the trap for the unwary criminal.

The question of entrapment involves two issues and should be considered by you in two stages. It is important that you realize this during your deliberations.

The first element you are to consider is whether Mr. Sansone was induced to commit the crime by anyone acting for the Government; in this case, by Hugo or Mr. Schnakenberg. It is an essential feature of the defense of entrapment that the idea of design of committing the crime originates with the law enforcement officer and not with the defendant.

The first question you must ask is who initiated

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the criminal transaction involved in Counts 1 and 2?
Did Hugo or Mr. Schnakenberg initiate the transactions in
this case? Did they propose or suggest it? Or did
Mr. Sansone initiate the criminal transaction involved in
this case? Did he propose or suggest it?

I instruct you that before you may consider
the defense of entrapment which has been raised by Mr.
Sansone you must find that Mr. Sansone has adduced some
evidence that Hugo or Mr. Schnakenberg initiated the
initial conduct and thereby persuaded Mr. Sansone to commit
the offense.

If you do not find such inducement there can
be no entrapment. If you are satisfied by the Govern-
ment's proof as to the lack of inducement, then there is
no entrapment as a matter of law and that is the end of
the inquiry.

If, however, you are satisfied from a review
of the record that Mr. Sansone has produced evidence that
the Government initiated the criminal transaction, then
you must consider the second issue, that is, did the
Government prove beyond a reasonable doubt that the induce-
ment, if it existed, was not the cause of the crime, but
rather that Mr. Sansone was ready and willing in any event
to commit the crime.

The defense of entrapment is not simply that the Government initiated the criminal transaction. Thus, if a person has a readiness and willingness to break the law, the mere fact that a Government agent provides a favorable opportunity for the commission of a crime is not a defense. In such case the Government has certainly not led an innocent person astray, but has only provided the means by which a defendant may realize his already pre-existing purpose.

If you find by a preponderance of the evidence that Mr. Sansone's acts were not willing and voluntary or that he was entrapped, as I defined entrapment a few moments ago, then you must find him not guilty.

If, on the other hand, you find that the Government has proved each element of either of the crimes charged beyond a reasonable doubt, and you do not find by a preponderance of the evidence that Mr. Sansone was entrapped, then you must find Mr. Sansone guilty on the count or counts on which you find the Government has proven its case.

Ladies, and gentlemen, in every criminal case there is a fundamental rule which every defendant has the right to rely on. That is the rule that the defendant may not be compelled to take the witness stand or offer

cs36

any testimony at all. Pleading not guilty, a defendant has in effect denied every material issue against him stated in the indictment. It is the prosecution which must prove him guilty and he cannot be required to disprove anything.

An accused person has a right to take the stand or to stand mute. The fact that he does not take the stand, as the defendants in this case have not, may not be considered by any of you as any indication of guilt as to them or any admission on their part or any inference of guilty.

That is not just an artificial rule. If you were accused of crime you would feel there is no reason for you to prove yourself innocent. However thoroughly you would be convinced of your innocence, or knew of it, you would understand that it is the Government's job to prove you guilty, if it could.

Ladies and gentlemen, I have come nearly to the end of my formal instructions, but in a sense the most important part of what I have to say is coming now. That is with regard to your role as jurors, because it is for you and you alone to decide whether either of the defendants on trial here is guilty of either of the counts as charged.

I know that you will try the issues that have

cs37

been presented to you in accordance with the serious oath that you took as jurors in which you promised that you would well and truly try the issues joined in this case, and as you probably remember from my repeating it time after time when I was impaneling the jury, based solely on the evidence which you have had put before you in this trial and the instructions as to the law which I am now giving you, render a true and just verdict.

I like that phrase "well and truly try the issues joined in this case." It goes back a thousand years and its old-fashioned flavor should mean something to you and remind you of the hundreds of thousands of juries who have performed this function before you and that you must a true verdict render based upon the evidence you have heard in this court and the exhibits.

In order for you to reach a verdict, either not guilty or guilty; as to either defendant your verdict must, of course, be unanimous; that is, everybody must agree on that particular verdict. In spite of the requirement of unanimity, each of you, however, must decide each count as to the defendant in question individually, in accordance with your own conscience, but only after deliberation with your fellow jurors to determine whether you believe a just verdict is being reached.

cs33

You must not hesitate to change your mind if you become convinced that your original view of the case did not accord with the facts or the law or whatever it is. On the other hand, you should not change your view just for the purpose of reaching a verdict as a matter of convenience.

I really have no reason to believe that this jury won't be able to reach a unanimous verdict one way or the other as to the matters put before it.

To sum up, if you find that there is a reasonable doubt that the law has been violated as to either defendant on any count, you shouldn't hesitate for any reason to acquit that defendant on that count. On the other hand, if you find that the law has been violated and the Government has proven it beyond a reasonable doubt as charged, you shouldn't hesitate because of sympathy or for any other reason to render a verdict of guilty as to that defendant on that count.

Nothing I have said in these instructions, and I stress this, is intended to indicate any view of mine towards how the various issues put before you should be decided.

Ladies and gentlemen, according to custom, Juror No. 1 normally acts as foreman of the jury in this

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court, and I am going to ask Mr. Maloney to do so in this case. That does not mean that he will have any authority that the rest of you don't have, but simply that he will assist in seeing to it that your deliberations are orderly and that all communications to the Court are properly made.

You have the right at any time, ladies and gentlemen, to ask for the exhibits, or any one of them; you have the right to have any of the testimony read to you or any of the tape exhibits played if you should wish, but I can't say that I encourage you to do that. You have the right to put any questions that you want to the Court.

If you do wish to have any testimony read back to you, or any exhibit, it would be very helpful if you will be as specific as possible about the material that you are interested in so that we can be assisted in locating that material in advance.

Of course, the way you get in touch with the Court will be to give a note to the Marshal who will be standing outside the door of your jury room. I am neither encouraging or discouraging your asking for anything, but certainly you have the right to have anything you wish.

It is not my practice, ladies and gentlemen, to send in all the exhibits, plunk them down on the jury room table and leave them there. However, if you prefer,

1 cs40

2 when you start your deliberations to have all the exhibits
3 before you, all you have to do is write a note saying so.
4 If, on the other hand, you just want a particular exhibit,
5 you can ask for that.

6 I will also say, because sometimes a jury asks,
7 that the Judge's charge I have just given you will not be
8 sent in to you. I hope it has been clear, but if it has
9 not been clear, then I'm afraid it will be less clear if I
10 sent it in to you and you all tried by yourselves to figure
11 out what it meant.

12 If you do have any questions about what my
13 charge is or what the law is, simply write me a note saying
14 that you have a question and come on out and tell me what
15 your question is, or specify the question in your note,
16 and it will be answered.

17 Now, ladies and gentlemen, I have come to the
18 end of my instructions. I want to meet briefly with
19 counsel in the robing room to see if they think any point
20 needs clarification.

21 I should say I will arrange to have sandwiches
22 and drinks brought in so that you can have lunch in today
23 so that your deliberations can proceed as smoothly as
24 possible and not to have to go out in this area.

25 Counsel will please come with me into the

1 cs41

2 robing room.

3 (In the robing room.)

4 THE COURT: Mr. Carey, please.

5 MR. CAREY: Your Honor, I have no exceptions
6 to the charge that you gave. I do request or remind the
7 court, more or less, that I did not hear you charge to the
8 jury during the formal charge that their recollection
9 controls, although I know they have been told that by you
10 during the trial.

11 THE COURT: I said, "on your determination of
12 the facts," but I'll use that phrase too.

13 MR. CAREY: Secondly, I request that the Court
14 give page 2 of the Government's request to charge No. 12.

15 Shall I read it back to your Honor?

16 THE COURT: Just let me see it. I can quickly
17 read it:

18 "In determining whether a particular defendant
19 was a member of the conspiracy you may consider all
20 of the evidence before you," et cetera.

21 "Thus in deciding, for example, whether Frank
22 Fuentes was a member of the conspiracy you may
23 consider the acts and declarations of Sansone."

24 I decline to so charge. I believe the charge
25 as I gave it is adequate for that purpose, unless Mr.

1 cs42

2 Rosenberg wants me to charge that.

3 MR. ROSENBERG: No, I woul object to that.

4 THE COURT: Is there anything else, Mr. Carey?

5 MR. CARLY: No, there isn't.

6 THE COURT: Mr. Rosenberg?

7 MR. ROSENBERG: I have no objections or
8 requests.

9 THE COURT: Thank you.

10 Mr. Shaw?

11 MR. SHAW: Your Honor, I have no real objections
12 to the charge. I would just like to note for the record
13 that I don't know what charge or what can be done in
14 regard to this serious problem, I believe with regard to
15 the articles in the newspaper with respect to narcotics
16 trials inferring foul play and missing witnesses.

17 THE COURT: If you want me to charge if any
18 member of the jury has seen such articles I remind them
19 that there is no contention whatsoever that Hugo is not
20 here as the result of any foul play on the part of any of
21 these defendants, I would consider it.

22 MR. ROSENBERG: I would object to your Honor
23 making reference to it. I think it would be detrimental
24 to both defendants. I would object.

25 THE COURT: I think so.

1 cs43

2 MR. SHAW: I would note one other thing:

3 That is in regard to the possession count
4 against my client. Mr. Carey noted in his summation that
5 my client was only being charged for one specific date in
6 June in regard to the large quantity of cocaine -- I think
7 it is June 3 -- and not as to June 13 or to May 23.
8 However the --

9 THE COURT: Does Count 2 specify one day?

10 MR. SHAW: Only one day. However, the charge
11 to the jury did not specify that one date. I don't know
12 which way that cuts either.

13 THE COURT: I said on the day or date in
14 question. I'll remind them that it refers to one day.

15 MR. SHAW: Thank you, your Honor.

16 THE COURT: Very good, gentlemen.

17 MR. SHAW: Your Honor, I will also endeavor
18 after the jury retires to get another attorney here.
19 I'll do my best.

20 THE COURT: I'll be up in chambers.

21 (In open court.)

22 THE COURT: Three or four small items; import-
23 ant, but small.

24 First, I want to remind you of what I think you
25 have been reminded many times, but counsel asked me to remind

cs44

you again that insofar as finding the facts are concerned it is your recollection as a jury that controls and not any statement made by the Court or counsel. Of course, you can always refer to the record if you have any doubts.

Second, you will recall that I said that as to Count No. 2 it was necessary for the Government to establish that on the day charged Mr. Sansone possessed with intent to distribute or actually distributed, and so on. The date charged, as you will note from the indictment itself, is June 4, 1976. So you must make your determination with regard to that day and not some other day.

Third, I have prepared for the convenience of the jury, and I will ask the Clerk to distribute it to the Foreman, two sheets, one with Mr. Sansone's name and a place for a finding as to each charge, and one with Mr. Fuentes' name with a place for a finding on Count 1, and all you need is to put the X marks in there, Mr. Maloney, when the jury reaches its verdict, and bring it with you when you announce that verdict in open court.

Finally, it is my sad duty, in a sense, to excuse at this time Mr. Francis, the alternate juror, because the law does not permit than a complete jury to deliberate with regard to the verdict, and since everybody else came through with fine colors, Mr. Francis, I'm afraid

cs:5

(80)

we won't need your services any further.

I thank you very much for your faithful attendance and your attention. If you want to stay in the belief that the jury will render a verdict while you are here, you are free to do that, but I do ask you to go now to the jury room and get your belongings so that the jury will be able to go in there after you have done that and start their deliberations.

Madam Clerk, I request that you swear the Marshal.

(Marshal sworn.)

THE COURT: Mr. Marshal, will you see whether Mr. Francis has left and so advise me?

JUROR NO. 1: I have an envelope with notes that one of the jurors made.

THE COURT: Will you hand it to the Clerk. The Clerk will keep it and return it after the verdict has been reached.

Thank you, ladies and gentlemen.

(The jury left the courtroom to deliberate at 10.45 a.m.)

THE COURT: I will be going to chambers. I request that if any requests are made by the jury for evidence that you agree as to what the exhibit is and

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transmit it without the necessity of my presence. If any request is made for testimony, I ask you to locate the testimony without my being present, and if there is no question as to what is to be read to the jury, simply read it without my being present.

If there is a question I will be down. If there are requests made by the jury I will ask the Clerk to read them to me and speak to counsel about them.

MR. SHAW: Is it at all possible that your Honor communicate to Justice Lerner's chambers, my predicament in Queens, and advise him that I am trying to get an attorney? I am also going to try to get my legal assistant to be in contact with him.

THE COURT: I will have my secretary call.

MR. ROSENBERG: If I could go back to my office I could be here within a period of ten minutes.

THE COURT: Where is your office?

MR. ROSENBERG: 401 Broadway.

THE COURT: I'm sorry. I can't grant the request. That often messes things up.

(Recess.)

(Jury present.)

THE COURT: I have your note which has been marked Government's Exhibit 5 for identification which

1 cs47

2 asks for transcripts of all the tapes which you read in
3 the jury box and photos of the meetings between Bill and
4 Michel at the diner during the discussion of the make-up
5 package, and counsel are finding those and they will give
6 them to you before they leave the room or we'll send
7 them in.

8 You also ask for a restatement of the three
9 elements required for guilt on both counts in writing, if
10 possible. I really hesitate to give it to you in
11 writing. I'm concerned about misunderstanding. I'm
12 going to try to make it clear to you without that.

13 THE FOREMAN: Is it possible to present a
14 question then to you for further clarification by anybody
15 in the jury?

16 THE COURT: Let me first explain the three
17 elements with regard to the conspiracy.

18 First, that the conspiracy charged in the
19 indictment existed. It isn't some dream that there was
20 such a conspiracy.

21 Second, that the defendant that you are consider-
22 ing at that time, whether it is Mr. Fuentes or Mr. Sansone
23 knowingly and willingly became a member of that conspiracy.

24 Now, that could have been at the very inception
25 or it could have been if you so find, at some other time --

cs48

I don't know -- and, third, that one of the conspirators committed one of the so-called overt acts that I told you about.

In that connection I realize that you haven't been furnished before this with a copy of the indictment and at the very bottom of page 1, and going over to page 2, you will see it states "Overt Acts".

There are listed six of them. The jury must find, in order to find any defendant guilty, that at least one of the conspirators committed one of those acts.

I will hand this now to the Clerk and ask her to give it to the Foreman.

With regard to the question of conspiracy, does anybody want to ask any question about that?

MR. CAREY: Before the indictment is given to the jury, perhaps --

MR. SHAW: May I see it, your Honor?
I believe Mr. Rosenberg is more interested than any of us.

THE COURT: They can disregard the reference to Mr. Fuentes. I told them it doesn't apply to Mr. Fuentes.

THE FOREMAN: My question is as to overt acts by one or both of the defendants. Does there have to

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be a direct link from one defendant to another defendant to this specific incident?

THE COURT: If you find that the conspiracy existed and that defendant X, whose case you are then considering, became a member of it, then all you have to find is that either or another of the conspirators committed one of the overt acts. There doesn't have to be any more link than that.

For example, if you wish to look at the statement of overt acts there, the first one states that Mr. Fuentes gave to another individual approximately 3.8 grams of cocaine. Even if you are considering Mr. Sansone's case, if you find that the conspiracy existed and Mr. Sansone was a member of it willingly and knowingly, then if you find that Mr. Fuentes did what was charged that would be sufficient to find that Mr. Sansone is guilty on Count 1.

Have I answered your question?

THE FOREMAN: So merely by association, your Honor --

THE COURT: It isn't a question of association. It is a question of you and me agreeing to do something and one of us starting to do it. It wouldn't be just association because with regard to the second element you

cs50

30

have to find that Mr. Sansone willingly and knowingly agreed with Mr. Fuentes to distribute cocaine. If it happens to be Mr. Fuentes who carried that out, both then would still be responsible.

THE FOREMAN: All right.

THE COURT: All right?

THE FOREMAN: Yes.

THE COURT: Now with regard to the second count which applies only to Mr. Sansone, you have to find that, first, on or about June 4, 1976 Mr. Sansone himself -- we are not concerned with Mr. Fuentes "Distributed or possessed with intent to distribute a narcotic drug.

Secondly, that what he did he did purposely and intentionally, wilfully and knowingly. It wasn't just a mistake.

Third, that what he possessed with intention to distribute or actually distributed was in fact a narcotic drug.

Do you all understand those elements?

Are there any questions about that?

All right, ladies and gentlemen, counsel and I are going to take lunch at the present time. We will be available again if you need us at two o'clock.

MR. CAREY: I have the exhibits the jury

1 cs51

2 requested. I can give them to Mr. Maloney. To the
3 extent they are the Government's exhibits, I'm giving
4 Mr. Maloney at this time 2-C, 5-C, 6-B and Government's
5 Exhibit 9-B.

6 THE COURT: Those are transcripts?

7 MR. CAREY: Yes.

8 THE COURT: And the photographs?

9 MR. CAREY: I have those, your Honor.

10 At this time I'm giving Mr. Maloney Govern-
11 ment's Exhibits 12-D, 12-C, 12-B, 12-A, and Government's
12 Exhibit 12, and also Government's Exhibit 14-G, Government's
13 Exhibit 14-H, Government's Exhibit 14-I, Government's
14 Exhibit 14-J, Government's Exhibit 14-D, Government's
15 Exhibit 14-E, Government's Exhibit 14-C and Government's
16 Exhibit 14-F.

17 THE COURT: Thank you, Mr. Carey.

18 Mr. Shaw, you have a transcript that you want
19 to give Mr. Maloney; is that right?

20 MR. SHAW: I have Exhibit H now, your Honor,
21 and I am looking for I that has the exhibit letter stamped
22 on it.

23 THE COURT: All right. When you find it you
24 can send it in through the Marshal.

25 Thank you, ladies and gentlemen, you are

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excused.

(The jury left the courtroom.)

MR. SHAW: I would like to introduce Herbert Brown, who is a member of the bar of this court and will substitute for me. I'm waiting also for Mr. Seltzer, my legal assistant, who will be with Mr. Brown and who knows a little about the case, so Mr. Sansone's rights will be protected while I'm gone. I hope to be able to come back.

Your Honor, Exhibit I did not have the identification letter tab stapled to it. I had given my copy --

THE COURT: Page 20?

MR. SHAW: Yes, your Honor. The Clerk had been out of the courtroom and it was to be stapled on later, but I don't think we got to do it.

THE COURT: Let Mr. Carey look at what you have got there and see if he agrees with that or doesn't agree.

MR. SHAW: I have a blank exhibit tab.

MR. CAREY: That is a correct copy, your Honor.

THE COURT: Just give it to the Clerk and she will mark it and she can send it in. I will be holding a hearing at two o'clock, so I will have to ask counsel

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to move their materials over to the desk there. It will
be an evidentiary hearing or a non-jury trial, as a matter
of fact.

(Recess until 2.00 p.m.)

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(Jury note at 2.15 p.m.)

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(In open court, jury not present.)

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MR. BROWN: If the Court please, the request by the jury concerned pictures taken in regard to the make-up package and they were very specific about that, your Honor. At the time I believe Mr. Carey submitted 12 and 14. Mr. Shaw stated that 12 is indeed -- should go to the jury, picture No. 12 should go to the jury as they are concerned with the make-up.

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But as to 14, when Mr. Carey submitted it somebody asked Mr. Shaw if he would consent to it and Mr. Shaw said that "I'm still checking." In the meantime they went in.

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Your Honor, in the interim we have checked during the lunch hour and we have checked throughout the testimony here, both Mr. Shaw, myself and his assistant have checked, your Honor, and it is obvious from the record that 14 did not have anything to do with the make-up package.

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Throughout the testimony of Mr. Schnakenberg --

THE COURT: Mr. Brown, I think I can save you time on this, and I would like to because I have another trial to conduct. I think you are probably right, but the jury, of course, has the pictures relating to

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2 No. 14 and they have a right to have a right to have
3 those pictures. I think that the important thing is to
4 make sure that they understand that the pictures do not
5 have to do with the event as to which they made the
6 request, and I will call them in at this time and so advise
7 them.

8 MR. BROWN: That a mistake was made in giving
9 them -- in answer to their questions -- Exhibit 14 did not
10 depict anything required concerning the make-up.

11 THE COURT: Yes, I will see to it they under-
12 stand that it was an error.

13 Mr. Carey, will you advise me what exhibit
14 group does this depict?

15 MR. CAREY: Exhibit 14 are pictures of Agent
16 Schnakenberg and the defendant Sansone in the vicinity of
17 the Market Diner at 43rd Street and Eleventh Avenue in
18 New York City. The question of whether or not they
19 are the particular pictures the jury asked for is debatable
20 to some extent. It's my recollection that Agent
21 Schnakenberg, in the course of discussing the sample which
22 he received earlier that day on June 18th, said at the
23 time the pictures were taken on June 18th, outside the
24 Market Diner, that this sample, like the original package,
25 was no good. I believe Mr. Sansone said something to

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the effect that this is purely not like the original package.

In any event, it seems it is unnecessary to bring the jury out and to tell them anything about this since it is their recollection of the evidence which controls.

THE COURT: Don't be so rigid. The defendant is entitled to have them know that it is not clear that the photos in Group 14 constituted discussions between Bill and Michel at the diner during the discussion of the make-up package. Of course it is their recollection that controls, but their recollection isn't infallible any more than ours. If they really wanted to know the difference between 14 and 12 they would have to go back to the record, just like the rest of us. And we are not ourselves that clear on the point. So that I think in fairness to the defendant they are entitled to know that much.

Let' not have further discussion. I will say this --

MR. BROWN: These were different dates involved. 12 and 14 are on different dates.

THE COURT: Can you find for me the dates involved? If you know that, show me what you are talking

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about.

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MR. BROWN: Yes, your Honor. We have the

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dates.

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In respect to 14, Exhibit 14, they were taken

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on June 18, 1976.

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THE COURT: When was the 12 series taken?

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MR. BROWN: The 12 series were taken on June

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11th. The transaction concerning the make-up was long

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since over or certainly over on June 18th.

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THE COURT: I say I will advise them that

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June 11 was the make-up package and June 18th was when the

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package was taken.

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I do want to say that Mr. Shaw and Mr. Carey

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were standing in the normal proximity in the court at

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the time Mr. Carey made the statement of what he was

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giving to the jury, in the sense that Mr. Carey specifically

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and loudly announced what he was giving to the jury. But

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I don't want it to stand on that.

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MR. ROSENBERG: I represent the defendant

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Fuentes and I take no position because his picture doesn't

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appear on any of these exhibits.

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Is this to be without the defendants?

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THE COURT: I don't think it is necessary to

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have them here. I think it is in their favor, so I don't

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see why they would be prejudiced by not being here.

MR. ROSENBERG: I just want the record to indicate that they are not here, your Honor. I am not pressing it.

(Jury present.)

THE COURT: Two brief announcements, ladies and gentlemen.

One, I have excused Mr. Shaw for the time being because he had an engagement in another court and he has asked me to allow his associate, Mr. Brown, to stay in his place to represent Mr. Sansone. That is Mr. Brown (indicating).

Does anybody know Mr. Brown, by the way?

Secondly, you asked when you sent your note this morning for the photos of the discussion between Bill and Michel at the diner during the discussion of the make-up package. In that regard, Mr. Carey, in perfectly good faith, I know, gave you two sets of photographs, the 12 series, I call them, and the 14 series. We now find that the 12 series do indeed relate to the subject you asked about and were taken on June 11th. But the 14 series do not relate to the discussion of the make-up package on June 11th. Indeed, the 14 series were taken on June 18th. They do not depict the diner area, I

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think, and they are relevant to the case, but they do

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not happen to be the pictures that relate to the make-up

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package.

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Thank you very much.

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(The jury left the courtroom.)

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(Recess.)

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CERTIFICATE OF SERVICE

May 24 , 19 77

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

By SRB